

**EXHIBIT 3**  
**FILED UNDER SEAL**

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
3

4                   \* \* \* \* \*

5                   THE CITY OF HUNTINGTON,

6                                 Plaintiff,

7                   vs.

CIVIL ACTION

NO. 3:17-01362

8                   AMERISOURCEBERGEN DRUG  
9                   CORPORATION, et al.,  
10                                 Defendants.

11                   \_\_\_\_\_  
12                   CABELL COUNTY COMMISSION,

13                                 Plaintiff,

14                   vs.

CIVIL ACTION

NO. 3:17-01665

15                   AMERISOURCEBERGEN DRUG  
16                   CORPORATION, et al.,  
17                                 Defendants.

18                   \* \* \* \* \*

19                   Videotaped and Zoom video conference  
20                   deposition of JAMES RAFALSKI taken by the Defendants  
21                   under the Federal Rules of Civil Procedure in the  
22                   above-entitled action, pursuant to notice, before  
23                   Jennifer Vail-Kirkbride, a Registered Merit  
24                   Reporter, on the 11th day of September, 2020.

1 Q. And did that include testimony? Did you  
2 review testimony in detail?

3 A. Uhm, in detail, uhm, that would -- to me --  
4 when you define detail, would that be from beginning  
5 to end?

6 Q. Yes.

7 A. In all of the depositions; no, sir.

8 Q. Are there any depositions you read  
9 beginning to end specific to the West Virginia case?

10 A. Yes.

11 Q. Which ones?

12 A. Uh, I didn't keep notes on that, some of  
13 the 30(b)s, I don't remember specifically which  
14 ones.

15 Q. Okay. There are categories of documents,  
16 obviously, you did not review; correct?

17 A. Uh, I don't have any categories that I did  
18 not review, but in the volume of the documents, I  
19 think it's reasonable that I didn't look at every  
20 one.

21 Q. Well, for example, looking at your reliance  
22 list, you did not review any West Virginia Board of  
23 Pharmacy documents; correct?

24 A. I don't have a direct relect --

1 recollection of looking at those; no, sir. I know  
2 they were available to me. I may have opened them  
3 and glanced at them, but I -- I don't have any  
4 recollection of analyzing them relative to any of  
5 the pharmacies I was looking at; no, sir.

6 MR. SCHMIDT: Well, then I will ask  
7 counsel. They don't appear on the reliance list,  
8 which means either Mr. Rafalski didn't get them or  
9 we've got a detective reliance list and we need to  
10 get a corrected one so we can have a deposition on  
11 the actual reliance list. Is counsel representing  
12 that the reliance list is accurate, including its  
13 omission of any West Virginia Board of Pharmacy  
14 documents?

15 MR. FULLER: To the best of my  
16 knowledge at this point.

17 Q. Okay. And you didn't review any deposition  
18 transcripts of any West Virginia Board of Pharmacy  
19 witnesses; correct, Mr. Rafalski?

20 A. I do not recall reviewing depositions of  
21 Board of Pharmacies.

22 Q. And none appear on your reliance list that  
23 I believe you're looking at right now, correct?

24 A. I do not see any; no, sir.

1 Q. And no West Virginia Board of Pharmacy  
2 documents appear on your reliance list; correct?

3 A. They do not.

4 Q. Okay.

5 A. And I don't -- I don't think I misspoke on  
6 that. I looked at a lot of documents. I don't know  
7 if maybe there were some contained in some of the  
8 other records I looked at, but it does not appear on  
9 my list.

10 Q. Do you know how often the West Virginia  
11 Board of Pharmacy reviews pharmacy licenses and  
12 renews them?

13 A. I do not, sir.

14 Q. Do you know when that review process  
15 occurs, that West Virginia Board of Pharmacy  
16 officials actually inspect the pharmacies?

17 A. Specific to West Virginia; no, sir.

18 Q. Do you know that they often write detailed  
19 reports on their inspections?

20 A. If it's similar to the State of Michigan,  
21 that would not surprise me, sir. I think that is  
22 one of their routine jobs.

23 Q. Do you know if they do that?

24 A. I do not.

1           Q.   Would reports written by West Virginia  
2   Board of Pharmacy inspectors detailing their on-site  
3   inspections of West Virginia pharmacies, including  
4   West Virginia pharmacies you talked about, be useful  
5   and relevant for you to review in assessing those  
6   pharmacies?

7                       Yes or no?

8           A.   I -- it's more complicated than a yes or  
9   no.   It's a possibility -- [overtalking] it's a  
10   possibility they could be relevant, depending on how  
11   the assessment or the inspection was done.

12          Q.   Okay.

13          A.   Without being present and having a full  
14   knowledge of what they did, I'm familiar with how,  
15   you know, my DEA experience was more of a  
16   recordkeeping inspection in the State of Michigan,  
17   making sure that the records are maintained for, you  
18   know, specifically prescriptions and drug storage  
19   and records are on-site.

20                    There wasn't -- unless it was a  
21   focused investigation in Michigan - I'm only talking  
22   about my experience with Michigan and somewhat with  
23   Ohio - they weren't typical diversion investigations  
24   unless that was their purpose outside of an

1 inspection.

2 Q. Do you know anything about how West  
3 Virginia inspectors inspect pharmacies in the course  
4 of renewing their registration every two years?

5 A. I do not, sir; no, sir.

6 Q. Okay, so let's focus on West Virginia. I'm  
7 not going to be asking you about Michigan because we  
8 are not in a Michigan case. In terms of West  
9 Virginia, are you aware that the DEA in making  
10 licensing decisions regarding pharmacies in West  
11 Virginia routinely relied on actions taken by the  
12 West Virginia Board of Pharmacy in terms of their  
13 licensing decisions, yes or no?

14 A. I am not aware if they did or didn't, sir.

15 Q. Okay. Would it be relevant to you if you  
16 were talking about a West Virginia pharmacy and the  
17 West Virginia pharmacy board -- the West Virginia  
18 Board of Pharmacy inspected that pharmacy and in  
19 their notes wrote "Good pharmacy," exclamation mark,  
20 would that be relevant to you in evaluating that  
21 pharmacy?

22 MR. FULLER: Form.

23 Q. Yes or no?

24 A. I wouldn't put a high level of importance,

1 geographic areas.

2 Q. Why?

3 A. Because my report was designed to be for  
4 those two geographic areas.

5 Q. Why not look more broadly in West Virginia?

6 Well, let me try the question  
7 differently, because I don't want to put you on the  
8 spot on this.

9 A. Did you understand your focus to be  
10 pharmacies in Cabell County and in Huntington, yes  
11 or no?

12 Or let me rephrase the question  
13 because I think I'm tripping you up with  
14 pharmacies. Did you understand your focus to be on  
15 distribution within Cabell County and Huntington,  
16 yes or no?

17 A. That question would be yes.

18 Q. Okay. Thanks for letting me rephrase it  
19 then.

20 A. Okay.

21 Q. Did you review licensing documents from the  
22 West Virginia Board of Pharmacy for the defendants  
23 in this case?

24 A. So -- so I understand that question, you're



1 saying did I -- did I review the state licensing for  
2 the -- for each of the three defendants?

3 Q. Yes, sir.

4 A. I don't think so; no, sir.

5 Q. Do you know what standards West Virginia  
6 applies to register distributor distribution centers  
7 that distribute into the state of West Virginia?

8 A. No, sir.

9 Q. Do you know what findings they have to make  
10 about the ability to maintain effective controls or  
11 follow the law in order to register a distributor as  
12 distribution centers to ship into West Virginia?

13 A. No, sir.

14 Q. Do you know what kind of inspections they  
15 do to make findings about whether distributors'  
16 operations are in compliance with all federal, legal  
17 requirements applicable to wholesale distribution  
18 before they allow them to ship into West Virginia?

19 A. I do not, sir.

20 Q. Do you know what findings they make  
21 regarding the maintenance and effective controls  
22 against diversion of controlled substances that West  
23 Virginia makes in order to allow ship distributors  
24 to ship into the state of West Virginia?

1           A. No, sir.

2           Q. Is it fair to say that from your  
3 perspective, you don't consider findings that the  
4 West Virginia Board of Pharmacy has made regarding  
5 these distributors in this case, their ability to  
6 maintain effective controls or comply with the law  
7 regarding controlled substances to be relevant to  
8 your opinions?

9           A. Well, understanding that I answered no to  
10 all those questions, but in my review of the due  
11 diligence documents that are submitted by the  
12 defendants, I don't have any recollection of seeing  
13 anything, any records or communications which was on  
14 that subject matter. So, you know, if those records  
15 exist, I -- I either didn't have access to them or  
16 they weren't provided or.

17                   But I did not ever see any documents  
18 in regards to West Virginia inspections or the  
19 competency of distributors as assessed by West  
20 Virginia, at least in the due diligence records, the  
21 central and the subsequent records provided by the  
22 defendants.

23           Q. My question is simply: Is it relevant to  
24 you? It is relevant to your opinions, the standards

1 that -- and let me just -- I asked a poor  
2 question. I'm sorry. I kind of paused for a  
3 second. Is it relevant to your opinion the  
4 standards that West Virginia applies in allowing  
5 distributors to distribute prescription opioids into  
6 West Virginia? Is that relevant to your opinions,  
7 yes or no?

8 A. I think it has a limited relevancy, but,  
9 yes.

10 Q. Okay. Are the findings that West Virginia  
11 makes regarding distributors and their distribution  
12 centers relevant to your opinions, yes or no?

13 A. Uhm, I think it has, again, a limited  
14 relevancy based on I do not have any idea what type  
15 of inspections, how in-depth, what they evaluate, so  
16 it has a limited relevancy, so I would say yes.

17 Q. Is it relevant to you that licensing  
18 decisions and the renewals we were alluding to  
19 earlier that the Board of Pharmacy in West Virginia  
20 makes regarding pharmacies in West Virginia?

21 A. No, I don't think that's relevant.

22 Q. Okay. Have you ever been to Cabell County,  
23 sir?

24 A. Yes.

1 A. Yes, sir.

2 Q. West Virginia conduct?

3 A. Yes, sir.

4 Q. Okay. Do you see these six flagging  
5 analyses --

6 A. I do.

7 Q. -- starting on page 48?

8 A. Yes, I do, sir.

9 Q. Each of these six was performed by Doctor  
10 McCann; correct?

11 A. Yes, sir.

12 Q. And you did not check the math on any of  
13 these six; correct?

14 A. I did not.

15 Q. You did not speak with Doctor McCann before  
16 he ran these calculations that were -- that you  
17 adopted into your report; correct?

18 A. That's correct, I did not.

19 Q. As I understand it, for the first time you  
20 spoke with Doctor McCann on August 29th?

21 A. Not literally the first time, but the first  
22 time in regards to CT2.

23 Q. Okay. And when did you literally speak to  
24 him for the first time?

1           A. Uhm, I don't remember the exact date, but  
2           it was right after the ARCOS material was received  
3           by his firm. I was there at his firm for a couple  
4           days and then subsequent.

5           Q. Okay.

6           A. Go ahead. Sorry.

7           Q. You didn't give him directions as to how to  
8           run your -- these six analyses before he ran them  
9           for CT2 and they were incorporated into your report;  
10          correct?

11          A. Are we speaking the first time I was with  
12          him or is that just an open question ever? I'm  
13          sorry, I --

14          Q. Before -- my question was before he ran  
15          these analyses that appear in your report at CT 1,  
16          you didn't speak with him about those analyses;  
17          correct?

18          A. I did not; no, sir.

19          Q. Why did you speak with him after he ran  
20          these analyses on August 29th?

21          A. I had some -- a couple questions. I read  
22          his deposition. I had a couple questions that I  
23          needed some clarification on.

24          Q. Okay. So you read his deposition in this

1 matter and then you had questions to clarify with  
2 him?

3 A. I believe that's the sequence; yes, sir.

4 Q. And what were those questions? What were  
5 the points you wanted to clarify?

6 A. Uh, the one point I remember is on the  
7 Masters Methodology B, or we'll call it maybe  
8 Masters B, I was -- wanted to make sure on the  
9 triggering order that he was -- his calculation on  
10 dosage units was the whole order and not the amount  
11 that just was above the triggering amount, if that  
12 hopefully makes sense to you.

13 Q. It does, yes. And you weren't sure of that  
14 before you reached out to him? [overtalking]

15 A. Well, no, that's why I reached out, if I  
16 was sure, then I wouldn't have done it.

17 Q. That's why that was an easy  
18 question. Collectively your different methods flag  
19 tens of millions of orders; correct?

20 A. They do.

21 Q. You've not reviewed each of those flagged  
22 orders; correct?

23 A. No, sir.

24 Q. Do you know how many of the tens of

1 millions you've actually reviewed?

2 A. Yes, I have not reviewed any of them.

3 Q. None of the initial orders, none of the  
4 follow-up orders; correct?

5 A. No, sir.

6 Q. So you did not personally determine whether  
7 any of the flagged orders when you look at them, you  
8 actually consider them to be suspicious; correct?

9 A. Well, I think the fact that they are  
10 identified by the trigger, the algorithm, makes --  
11 makes them not a suspicious order.

12 Q. Okay. Did you individually review any of  
13 them to see if you just looked at the order on its  
14 face whether you would consider it to be suspicious?

15 A. No, sir.

16 Q. Did you individually look at any of them to  
17 consider just based on the information you had about  
18 the actual order whether you would consider it to be  
19 likely to be diverted?

20 A. Can you say that one more time, please.

21 Q. Sure. Did you look at the individual  
22 orders to consider whether based on the information  
23 actually reflected in the individual orders, you  
24 would make the judgment that there were likely to be

1 did you actually evaluate any single order and make  
2 a judgment, "This order is likely to be diverted,"  
3 based on the facts of looking at this order,  
4 separate and apart from your flagging exercise. Did  
5 you look at any orders to see "Based on the facts of  
6 this order I can come to a judgment that it's likely  
7 to be diverted"?

8 A. I think my opinion is that more likely than  
9 not all of those orders are diverted.

10 Q. Well, that's what I'm going to come to. My  
11 question is did you actually look at any of the  
12 individual ones to say, "When I look at this  
13 individual one, this looks like it's likely to be  
14 diverted"?

15 A. No, sir, not individually.

16 Q. Okay. Did you review the diligence files  
17 for every one of these tens of millions of flagged  
18 orders?

19 A. There -- that wouldn't be possible.

20 Q. For example, you can't say you reviewed the  
21 complete diligence files for McKesson in Cabell  
22 County; correct?

23 A. Well, that's a different question, is that  
24 outside of discussing the trigger orders?



1           Q. Just in total. Or as to the trigger  
2 orders, let me ask you as to the trigger orders.  
3 Did you review all of the McKesson diligence files  
4 for every one of tens of millions of triggered  
5 orders in Cabell County that you identified?

6           A. Well, there -- I didn't do that because I'm  
7 not sure that when I applied the methodology, that  
8 that triggered order would be investigated by  
9 McKesson. So it wouldn't have been -- I guess I  
10 could have, but it -- I wouldn't expect that for  
11 every triggered order McKesson would have conducted  
12 a due diligence investigation because my application  
13 is kind of hypothetical that McKesson didn't have  
14 any knowledge.

15          Q. Okay. Did you -- where there was a  
16 diligence file in these tens of millions of  
17 triggered orders, did you review every diligence  
18 order for McKesson that exists?

19          A. Outside of the trigger -- outside of the  
20 triggered orders, I reviewed the -- McKesson's due  
21 diligence files.

22          Q. As to triggered orders, where diligence  
23 files exist as to the triggered orders, did you  
24 review every one of the McKesson diligence files

1 corresponding to the tens of millions of triggered  
2 orders?

3 A. I did not.

4 Q. Did you review every one of the ABDC  
5 diligence files corresponding to the tens of  
6 millions of triggered orders? Where they exist.

7 A. I'm struggling on this one, because if I  
8 reviewed the due diligence files, I guess I would  
9 have an expectation that somewhere in those  
10 triggered orders would be potentially an order that  
11 was triggered by a due diligence file I -- I  
12 reviewed. So to turn that around is -- is my review  
13 of due diligence files I would have an expectation  
14 that -- that there would be an order for that  
15 particular customer. Hopefully, that makes sense.

16 Q. I'm not sure it does. So let me follow  
17 up. As to Cardinal and ABDC for the tens of  
18 millions of orders you flagged for them, do you know  
19 yes or no, that you've reviewed all the diligence  
20 files that exist regarding those tens of millions of  
21 orders?

22 A. It's difficult for me to answer because I  
23 extensively reviewed some of the files, but if we  
24 look -- when you say tens of millions of orders, I

1 didn't specifically go in and confirm that one of  
2 those identified orders was in the due diligence  
3 file I reviewed. So I guess if I don't specifically  
4 know, I would say, no.

5 Q. Okay.

6 A. But I have a high -- high expectation that  
7 that occurred, but I don't -- I didn't specifically  
8 do it the way you asked, so I would answer no.

9 Q. Okay. And you said you -- you intensively  
10 reviewed some of the diligence files. Do you know  
11 that you reviewed all the diligence files that have  
12 been produced in this case?

13 A. I -- yes.

14 Q. In their entirety in that 109 hours or 119  
15 hours you said that you spent reviewing documents  
16 and thousands of pages of testimony and writing a  
17 very extensive report in the first instance by  
18 yourself.

19 A. Yes.

20 Q. Okay.

21 A. Let me just clarify. Could I just clarify  
22 that. I -- I reviewed the documents and ongoing --  
23 and I was comfortable with my review at the time I  
24 turned in my report, and I'm fairly certain,

1 any of these orders.

2 Q. Well, let me -- let me be more precise in  
3 my question. I don't -- and let me ask you to stick  
4 to my question. The way your Method A works is  
5 there is an initial flagged order and then an  
6 assumption that every order after that was improper;  
7 correct?

8 A. Yes, sir.

9 Q. Do you know of those initial flagged orders  
10 under Method A, how many between zero and 100  
11 percent were actually investigated and the flag  
12 cleared by the defendants?

13 A. I don't have a definitive answer to that,  
14 sir.

15 Q. Okay. That's not something you tried to  
16 evaluate; correct?

17 A. I did not.

18 Q. That's not something Doctor McCann tried to  
19 evaluate, to your knowledge, correct?

20 A. Well, in forming my opinion, it wasn't  
21 necessary, but I'm responding to the question. I  
22 don't -- I can't speak for what Doctor McCann did, I  
23 don't think he would do that because his job was  
24 only to apply the algorithm, so I don't think he did

1 any independent evaluation outside of that. But I  
2 can't answer for Doctor McCann.

3 Q. Do you know what percentage of these tens  
4 of millions of orders that Doctor McCann's  
5 calculations flagged actually went to fill  
6 legitimate medical need?

7 A. I do not.

8 Q. Do you know if it's 100 percent, zero  
9 percent, or somewhere in between?

10 A. Well, 100 percent is definitive, so it  
11 wouldn't be 100 percent. Based on my review of the  
12 records I did for the compliance efforts by the  
13 three defendants in regards to their own suspicious  
14 orders, and whether or not they cleared those and  
15 how they evaluated them, there was a systemic  
16 failure there.

17 So that, you know, that percentage,  
18 and I'm not going to give you a percentage because I  
19 don't think I can, but those orders that are flagged  
20 by -- by this methodology, there's no other -- I can  
21 give you no other reason other than there is a  
22 total, systemic due diligence failure -- a  
23 maintenance of effective controls failure to give  
24 you a percent, but it's -- it's more likely than not

1 all of them.

2 Q. Okay. Do you know whether it was between 1  
3 and 99 percent of these orders that went to fill  
4 legitimate medical needs?

5 A. I don't know, sir.

6 Q. Do you know -- am I right in understanding  
7 you believe all of these tens of millions of orders  
8 should have been reported to the DEA as suspicious?

9 A. Oh, that's a different question.

10 Q. Should they -- should all of these tens of  
11 millions of orders that you flagged in Method A have  
12 been reported to the DEA as suspicious? Yes or no?

13 A. No.

14 Q. Okay. How many should have been reported  
15 to the DEA as suspicious?

16 A. The nature of my application of the  
17 methodology, the algorithm, wasn't for the purpose  
18 to identify orders that would be reported to the  
19 DEA. It was just a triggering mechanism to identify  
20 orders from the transactional data from the  
21 defendants. It -- it would -- it's a much -- it's  
22 broader, it's a broader requirement for the  
23 defendants than -- than just to -- for me to apply  
24 an algorithm to their transactional data and then

1 brought along based on your assumption?

2 A. For each defendant there is one first order  
3 and every subsequent one is flagged if we are  
4 talking about Masters A?

5 Q. Yes, how many first orders?

6 MR. FULLER: Object to form.

7 Q. Like, let's take an example of the 11.6  
8 million oxycodone orders for ABDC, how many of those  
9 11.6 million were initial orders and how many of  
10 them just came along due to the assumption?

11 A. One initial order.

12 Q. And then the remaining 11,610,919 orders  
13 were cumulatively flagged?

14 A. Yes, sir.

15 Q. Okay. And is that true for every one of  
16 your defendants, that there was only one initial  
17 order flagged and then every other order you  
18 identify was flagged based on the assumption that  
19 because there was not diligence on that initial  
20 order, the subsequent orders should have been held?

21 A. So -- just so I'm clear, the totality of  
22 all of -- all of the figures here or are we talking  
23 about Masters A?

24 Q. Masters A. Just Masters A.

1           A. All right. I didn't want to answer  
2           incorrectly or make assumptions. The first one on  
3           Masters A, each defendant would be yes to that  
4           answer, the first one.

5           Q. Okay. And so am I correct that for Method  
6           A, for each defendant there is one, single order  
7           that drives the remaining millions of orders that  
8           you have flagged?

9           A. Yes, sir.

10          Q. And have you looked -- have you identified  
11          those single orders for -- in their entirety for  
12          McKesson, Cardinal, and ABDC?

13          A. I don't understand the question, sir.

14          Q. Have you looked at those initial orders for  
15          McKesson, Cardinal, and ABDC that are the initial  
16          flagged orders of your Method A?

17          A. No, sir.

18          Q. Do you know the diligence that was  
19          conducted on those initial flagged orders for  
20          McKesson, Cardinal, and ABDC, not having looked at  
21          the actual orders themselves?

22          A. Well, I couldn't know the diligence if I  
23          answered I didn't know the orders. And as I  
24          answered earlier, understanding your question, I



1           A. Go ahead, I'm ready.

2           Q. All right. So "Question: And your  
3 computer algorithm was based on the standard  
4 operating procedures from McKesson's Lifestyle Drug  
5 Monitoring Program; correct?" And then the answer,  
6 "Uhm, broadly speaking based on, yes, it wasn't  
7 intended to implement precisely McKesson, uhm,  
8 limits anymore than the first method was intended to  
9 implement precisely the Masters decision or the  
10 fourth method intended to implement the Chemical  
11 Handler's Manual. I think as we have discussed  
12 before, each of these methods are stylized --

13                       (The court reporter requested  
14 clarification)

15           Q. "I think as we have discussed before, each  
16 of these methods are stylized illustrations  
17 suggested by the underlying documents that you have  
18 identified, not attempting to implement these  
19 documents precisely." Did I read that correctly?

20           A. Yes, sir.

21           Q. Now, let me drill down on some of that  
22 specific language.

23                       First of all, do you see where he  
24 says at the bottom of 180 -- 124 and the top of 125,

1     that the first method was not intended to implement  
2     precisely the Masters decision?

3         A.   Yes, sir.

4         Q.   And do you agree with that?  Is that a true  
5     statement?

6         A.   Yes, sir.

7         Q.   The first method does not implement  
8     precisely the Masters decision; correct?

9         A.   I do.

10        Q.   And then at the end, he says, again, that  
11     we were not attempting to "implement these documents  
12     precisely."  Is that a true statement as to every  
13     one of your six methods that you copied from Doctor  
14     McCann?

15        A.   Yes.

16        Q.   Each one of them is based on something a  
17     distributor was doing or it was in the Chemical  
18     Handler's Manual, but none of them are an attempt to  
19     implement those documents precisely; correct?

20        A.   That's correct.

21        Q.   And he uses this phrase they are "stylized  
22     illustrations suggested by the underlying  
23     documents."  Do you agree with that as an accurate  
24     description of what you were doing in Methods A

1 answer. So I'm hopefully not answering it  
2 differently, but it's always plausible to use  
3 it. Whether or not it would be a appropriate  
4 trigger is a different question.

5 Q. Do you stand behind your testimony that  
6 Method A and Methods C through F, Method A is the  
7 only one that you think would be plausible? Is that  
8 a true statement?

9 A. Yes. Well --

10 Q. Do you stand behind your testimony that  
11 between Method A and Methods C through F, you would  
12 not use Methods C through F?

13 A. That's a correct statement.

14 Q. Okay.

15 A. If you're referring to, I guess, the  
16 hypothetical that I was a defendant and I was a  
17 distributor and I would use it for an algorithm  
18 trigger of suspicious orders, if that's what your  
19 question is, I would not.

20 Q. Did you -- when you were at the DEA, let's  
21 focus on Methods A and B. First of all, you agree  
22 with me that Method A does not look at pattern or  
23 frequency; right?

24 A. That's correct.

1 to correspond, to be a stylized illustration of what  
2 Masters was doing, you were okay with the Masters  
3 methodology which did not take into consideration  
4 unusual pattern or frequency; correct?

5 A. Yes, sir.

6 Q. Did you ever actually run -- Method A and  
7 Method B are both based on Masters; correct?

8 A. Yes, sir.

9 Q. Which is closer to Masters, Method A or  
10 Method B?

11 A. If we're talking about the algorithm,  
12 they're the same, so both.

13 Q. Well, they generate radically different  
14 numbers. So which is closer as to -- which is less  
15 of a stylized illustration and closer to reality in  
16 terms of what Masters was doing in the real world,  
17 Method A or Method B?

18 A. Well, it's -- it's not as simple as saying  
19 A or B. Both of them are the same trigger and order  
20 the same amount -- identify the same number of trans  
21 -- the same initial transaction when applied to the  
22 data. A has the due diligence assumption and B does  
23 not. So once the first trigger, I don't know that I  
24 looked at them as one is effective as the

1 other. They are the same initial trigger and one  
2 removes the due diligence assumption.

3 Q. Did Masters use the due diligence  
4 assumption?

5 A. No, sir.

6 Q. So Masters is closer to B; correct?

7 A. Uhm, the exercise of applying these  
8 algorithms to the transaction data wasn't to assess  
9 which one was most similar or closer or had anything  
10 to do with Masters. It was just an algorithm  
11 triggering mechanism as part of the whole due  
12 diligence -- or the whole maintenance of effective  
13 controls to be applied to the transactional  
14 data. So I never really considered the -- whether  
15 or not one or the other was -- was better for  
16 Masters.

17 MR. SCHMIDT: Move to strike as  
18 entirely nonresponsive.

19 Q. Method B is closer to Masters than Method  
20 A; correct?

21 A. I never assess them as whether one is more  
22 like or less like Masters. It's just an algorithm.

23 Q. Which one is closer to Masters, sir?

24 A. I don't have a response to that.

1 the due diligence assumption?

2 A. No, sir.

3 Q. Okay. And the difference between A and B  
4 is that A includes the due diligence assumption and  
5 B does not; correct?

6 A. That's correct.

7 Q. And so in that regard, B is closer to  
8 Masters and the real world than A; correct?

9 A. I don't know that it's closer. It's  
10 different and why I say that is because B removes  
11 any consideration whether due diligence is even  
12 done. And that would be way outside the scope of  
13 Masters, too, so when you're drawing those  
14 comparisons, as far as the triggering, I'll go back,  
15 they're exactly the same.

16 MR. SCHMIDT: Move to strike as  
17 totally nonresponsive.

18 Q. Sir, A and B are the same except A has a  
19 due diligence assumption and B does not; correct?

20 A. That's correct.

21 Q. The due diligence assumption in A was not  
22 used in the Masters program in the real world;  
23 correct?

24 A. That's correct.

1 Q. So in that regard, the only difference  
2 between the two, Method B is closer to how Masters  
3 was used in the real world than Method A; correct?

4 A. I don't want to be argumentative. They  
5 both identified the first suspicious order, so it  
6 was used the same. If you're saying the number of  
7 orders identified depended on the due diligence  
8 assumption, then I guess the answer is yes. But  
9 then -- (audio distortion) -- I'm not done,  
10 Mr. Schmidt. That doesn't mean that I accept B  
11 because that assumes there is no due diligence. So  
12 it's -- it's just a different evaluation.

13 Q. I am not asking you which one you  
14 accept. I'm asking you which one is closer to the  
15 way that Masters flagged suspicious orders in the  
16 real world. And in terms of which is closer, how  
17 Masters flagged suspicious orders in the real world,  
18 it's B; correct?

19 A. I generally would agree with that.

20 Q. Okay. And you did not include Method B in  
21 any of your earlier reports, did you?

22 A. That's correct.

23 Q. And why is -- why is it that you for the  
24 first time have included Method B in your West

1 Virginia report?

2 A. Well, I was -- I was interested in -- in  
3 running that methodology without the due diligence  
4 against the transactional data to see how many  
5 orders were flagged. And as -- and, you know, to  
6 see what the anticipated results were. I saw the  
7 results. I think it's still a significant number  
8 and, you know, it was interested -- I think it was  
9 just an interesting different way to look at the  
10 data with a different methodology.

11 Q. Are you aware -- did you ever run the  
12 Masters methodology when you were at the DEA to any  
13 set of data.

14 A. No, sir.

15 Q. Are you aware of anyone at DEA who ever ran  
16 the Masters methodology when you were at the DEA to  
17 any set of data?

18 A. No, sir.

19 Q. Are you aware of any company or regulator  
20 who has ever run Masters Exhibit A with the due  
21 diligence assumption to any set of data in the  
22 history of the world?

23 A. No, sir. Not at least up to when I left my  
24 employment.



1 Q. What about since? In review of any  
2 documents or continued work you do to maintain your  
3 expertise?

4 A. I have not seen that; no, sir.

5 Q. Is there any general acceptance you can  
6 point me to for Method A with its due diligence  
7 assumption?

8 A. Acceptance by --

9 Q. Anyone, distributors, regulators,  
10 academics?

11 A. No, sir.

12 Q. Okay. Are you aware that Mister -- Doctor  
13 McCann identified -- well, let me just be sure I --  
14 I have your testimony. Did you ever see Masters  
15 apply Method A or Method B to their distribution  
16 over a period of time?

17 A. No, sir.

18 Q. And what I'm struck by is when I look at  
19 Method A, the percentages you have are pretty  
20 stunning, 90.6 percent, 91.1 percent, 93.1 percent,  
21 82.5 percent, 87.9 percent, 87.4 percent, and I can  
22 read those slower into the record. They're not  
23 particularly critical, but my point is they're all  
24 above 80 percent; correct?

1 basis or on a rolling 30 day basis; correct?

2 A. I don't remember us having a specific  
3 discussion about that. I could be wrong. I only  
4 recall the calendar month.

5 Q. Okay. You recall that issue has come  
6 up. You've seen that -- you saw that discussed in  
7 Doctor McCann's deposition; right?

8 A. I don't ever remember it an issue we  
9 discussed or had some contention about. I don't  
10 recall that.

11 Q. Well, let me try it this way. Do you know  
12 whether Doctor McCann used a calendar month  
13 calculation or a rolling 30-days calculation in  
14 his --

15 A. Calendar month. I'm sorry, calendar month.

16 Q. And do you know whether Masters used a  
17 calendar month or a 30-day rolling calculation?

18 A. I believe in reading their policy, it was a  
19 30 day.

20 Q. So in that regard, what Method A and Method  
21 B do is different than Masters; correct?

22 A. Yes, sir.

23 Q. And you saw that Doctor McCann acknowledged  
24 that in his deposition.

1 Q. The threshold is never changed under Method  
2 B based on any subsequent developments; correct?

3 A. That's correct.

4 Q. It doesn't change if the population in  
5 Cabell County changes; correct?

6 A. That's correct.

7 Q. It doesn't change if the medical need in  
8 Cabell County changes; correct?

9 A. It's fixed, sir; right after the first  
10 trigger.

11 Q. So correct?

12 A. Yes.

13 Q. It doesn't change if the demographics of  
14 the pharmacy or the circumstances of the pharmacy  
15 change; correct?

16 A. It does not.

17 Q. If a cancer center opens up next door or a  
18 competing pharmacy closes, that doesn't cause a  
19 change in Method B; correct?

20 A. It does not.

21 Q. It doesn't change to account for increases  
22 in the DEA's own quotas; correct?

23 A. That is correct.

24 Q. Now, Masters did not lock in the first six

1 months for all time as the threshold, did it?

2 A. It did not.

3 Q. In Masters after a six-month history with a  
4 control group, the monthly limit will be established  
5 and updated on the first of every month, correct?

6 A. Yes, sir.

7 Q. And so that is another deviation between  
8 Method B and Masters; correct?

9 A. It's not the same exactly as Masters,  
10 that's correct.

11 Q. Because it's locked in for all time based  
12 on six months in Method B, it was not locked in  
13 based on all -- for all time as Masters used it.

14 A. Uhm, there's a reason for that, but, yes,  
15 that's a correct statement.

16 Q. Okay. Did you ever look at all the Masters  
17 diligence files to see how many Masters cleared  
18 flagged orders under their methodology in every  
19 instance?

20 A. Did you say every due diligence file?

21 Q. Yes.

22 A. I did not.

23 Q. Okay. If we go back to -- and I wrote it  
24 down because I want to make sure I have the verbiage

1                   So that's not right to you?

2           A.   Are you asking me, Mr. Schmidt?

3           Q.   Yes, having heard nothing from one of my  
4   colleagues that I mis -- misstated what Doctor  
5   McCann says in his report.

6           A.   I have a general recollection that he does  
7   do an example like that.

8           Q.   Okay.   So if the highest level in the  
9   preceding six months is 10,000, if in month seven  
10   you get an order for 10,100 bills which is an extra  
11   bottle, that would -- that would be flagged under  
12   your methodology?

13          A.   Yes, it would.

14          Q.   In your view, if the moment that flagged  
15   order came in, the pharmacy calls a sales rep at the  
16   distributor or some other employee at the  
17   distributor or a regulatory employee at a  
18   distributor - and I'm getting a friendly assist here  
19   from my colleague so I know it is in fact 10,000 -  
20   if they got a call from the pharmacy and the  
21   pharmacy said, "Hey, we ordered one extra bottle  
22   this month.   We're going to order one less next  
23   month, are you okay with that?"   Would that be a  
24   suspicious order to you or should that order be

1     although I don't have any reason to believe it  
2     wouldn't be the same systemic failure with due  
3     diligence that it would be for all the other  
4     registrants, so -- but it wasn't applied, so I just  
5     don't know, just to arbitrarily talk about numbers.

6                     MR. SCHMIDT: Move to strike as  
7     nonresponsive.

8             Q. My question is: Do you believe that every  
9     order flagged under your Method A is likely to be  
10    diverted; yes or no?

11            A. Based on the systemic failure of the due  
12    diligence, yes.

13            Q. Do you believe that 95 percent or more than  
14    90 percent of orders if this not real world Method A  
15    were applied to the Veterans' Administration orders  
16    are likely to be diverted; that 90 percent of those  
17    Veterans' Administration orders are likely be  
18    diverted?

19            A. Well, I don't know if it's not real world,  
20    but, again, you know, looking at the total systemic  
21    failure of the due diligence and it's not -- it's  
22    not just due diligence, it's encompassing all of the  
23    requirements to maintain effective controls of  
24    diversion. That not occurring after a triggering

1 Q. Well, how much have you spent since then?

2 A. Since the submission of my report?

3 Q. Yes.

4 A. I -- I don't have a total calculation.

5 MR. SCHMIDT: Okay. I'm just going to  
6 say for the record, my understanding is the  
7 plaintiffs have objected to producing invoices and  
8 so we do not plan to produce invoices for our  
9 witnesses. But at a minimum, we need to be told how  
10 many hours Mr. Rafalski has spent. And if we could  
11 get that information, ideally in this deposition,  
12 but promptly. And we'd ask that it be divided  
13 between before and after his report. I would  
14 appreciate that.

15 Is there an objection to providing  
16 that?

17 MR. FULLER: Let me see what I can do  
18 about getting it before we finish here today.

19 MR. SCHMIDT: Thank you, I'd  
20 appreciate that.

21 Q. Let's go back to Exhibit A -- Exhibit 1,  
22 I'm sorry, your report. And let's go back to page  
23 48.

24 And I just want to make sure I

1 understand one aspect of your flagging methodology,  
2 please. Exhibit A identifies tens of millions of  
3 orders; correct?

4 A. Yes.

5 Q. And do I have your testimony correct that  
6 you believe every single one of those orders are  
7 likely to be diverted?

8 A. I guess, I think I answered this  
9 earlier. If you -- if that question means that you  
10 are asking me to definitively -- to tell you  
11 definitively that every one of those orders,  
12 individual orders were diverted, I don't -- I can't  
13 do that, but my opinion is based on the lack of due  
14 diligence, the systemic lack of due diligence, that  
15 more likely than not they were.

16 Q. All of them?

17 A. More likely --

18 Q. -- all of the millions were likely  
19 diverted?

20 A. More likely than not; yes, sir.

21 Q. And where is that diversion occurring?

22 A. I don't understand that question. In a  
23 geographic area of my evaluation of the -- the  
24 distributors' distributions.



1 Q. Would it be valuable for the DEA to be able  
2 to run the simplistic code that is reflected in  
3 Method A and determine that 80 to 90 percent of  
4 orders being shipped by distributors were likely to  
5 be diverted? Would that be valuable if that were,  
6 in fact, a valid exercise?

7 A. I don't think it's a valid exercise, so  
8 I --

9 Q. Okay. I don't think it is, either. DEA  
10 has never conducted that exercise that you're aware  
11 of, have they?

12 A. No, not that I am aware of.

13 Q. And are you aware of -- all right. That's  
14 fine.

15 Let me show you a couple of examples  
16 just to make sure I understand your methods.

17 MR. SCHMIDT: Could we -- I'm not sure  
18 what the tab number is, Megan, for demonstrative  
19 3. Do we -- do we have -- we don't have --

20 MS. MONAGHAN: Oh, sorry. Yeah,  
21 sorry. It's going to be tab 12 for demonstrative  
22 3.

23 MR. SCHMIDT: Let's call this Exhibit  
24 12 and let's put it up on the screen, if we could.

1 Q. And then any order after that that was over  
2 10,000 would be flagged under Method A; correct?

3 A. That's correct.

4 Q. And not just any order after that, but any  
5 order -- I'm sorry, not just any order over 10,000,  
6 but every one from the first -- let me try it again.

7 Once an order was flagged as being  
8 over 10,000 every order after that would be flagged;  
9 correct?

10 A. Under Methodology A?

11 Q. Yes.

12 A. Yes, sir.

13 Q. So in this scenario, the order in August  
14 would be flagged, correct?

15 A. That's correct.

16 Q. And then every order after that would be  
17 flagged, as well.

18 A. In this hypothetical situation; yes, sir.

19 Q. Just so I'm clear, this is the level of  
20 information that Doctor McCann's calculations draw;  
21 correct? Just the sheer numbers and nothing else.

22 A. Yes, sir.

23 Q. It doesn't do any evaluation of diligence  
24 files, it doesn't do any evaluation of pharmacy

1 circumstances, community circumstances, DEA quota  
2 levels, changes in prescribing practices, anything  
3 like that; correct?

4 A. Correct.

5 Q. And so if Doctor McCann were given just  
6 this example, August and everything after August  
7 would be flagged; correct?

8 A. Yes, sir.

9 Q. And you would say that August and  
10 everything after August would be likely to be  
11 diverted; correct? Under your 51 percent, more  
12 likely than not rationale; correct?

13 A. Well, it's -- I didn't say 51 percent. And  
14 if I'm using Methodology A with the due diligence  
15 assumption, if the 10,100 was not investigated, if  
16 there was no due diligence, the trigger is --  
17 identifies the order.

18 The size, it could be 100, we settled  
19 on because we don't do it a pill at a time or it  
20 could be a million would stop the order, and if  
21 there is no due diligence to clear that, more likely  
22 than not independent of the size, any of those  
23 subsequent orders could be subject to diversion  
24 because the -- the -- there was no investigation to

1 diverted because it was 100 pills higher than the  
2 March order, would you reach that conclusion? Yes  
3 or no?

4 A. Mr. -- Mr. Schmidt, you can't interject  
5 Mr. McCann's methodology and then say -- and then  
6 eliminate the methodology and ask me to look at a  
7 number. If what you're saying if I just looked at  
8 that string of numbers, there's no particular number  
9 I would pick out. But if you interject Doctor  
10 McCann running the methodology, that -- that would  
11 provide a different answer.

12 Q. I'll try it one more time and then we'll  
13 call the Judge.

14 Looking at those numbers and the fact  
15 that August is 100 pills more than March, would that  
16 lead you to conclude that August is -- those pills  
17 are reasonably -- more likely than not, likely to be  
18 diverted; yes or no?

19 A. If we're looking at a string of data and  
20 now you have dropped the Doctor McCann application  
21 of the methodology and if I'm just looking at a  
22 string of data, the answer would be, no, I could not  
23 tell.

24 Q. Okay. So I'm going to try one more time

1 without the speech. If you just looked at these  
2 numbers, because I'm not sure if you understand what  
3 Doctor McCann did. Do you know all of his  
4 assumptions?

5 A. Uh, yes, sir.

6 Q. Okay. Tell me the ten assumptions he made  
7 in coming up with his code that he testified about  
8 under oath.

9 A. I do not know all ten; no, sir.

10 Q. Okay. Thank you. Looking at Doctor McCann  
11 -- looking at these numbers, does the fact that  
12 you've got 100 more pills in August than in March  
13 tell you that that August order more likely than not  
14 is -- is likely to be diverted?

15 A. I'm going to answer the same way. Just  
16 purely looking at the string of numbers if that's  
17 your question, no.

18 Q. Does it tell you that the orders from  
19 September Year 1 through July Year 2 are more likely  
20 than not, likely to be diverted?

21 A. Purely looking at those numbers; no, sir.

22 Q. Okay. Let's look at another example.

23 MR. SCHMIDT: Megan, what's the tab  
24 for demonstrative 4?